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COURT OF APPEALS  
DIVISION II

NO. 51173-8-II  
Kitsap County No. 09-1-01567-6

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,  
Respondent,

v.

EDWARD MARK OLSEN,  
Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
KITSAP COUNTY

The Honorable Judge Jeanette M. Dalton

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APPELLANTS RAP 10.10 STATEMENT OF ADDITIONAL GROUNDS

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ORIGINAL

TABLE OF CONTENTS

A.	INTRODUCTION.....	1
B.	ASSIGNMENTS OF ERROR.....	1
C.	FACTS OF THE CASE.....	1
D.	ARGUMENT.....	1
	1. The Trial Court Abused Its Discretion in Denying Olsen's Motion on the Ground That the Recantation Testimony Was not Credible.....	1
E.	CONCLUSION.....	10

## TABLE OF AUTHORITIES

<u>In re Pers. Restraint of Clements</u> , 125 Wn.App 634, 106 P.3d 244 (2005).....	7
<u>In re Pers. Restraint of Spencer</u> , 152 Wn.App. 698, 218 P.3d 924 (2009).....	8
<u>State v. Chenowith</u> , 160 Wn.2d 454, 158 P.3d 595 (2007).....	7
<u>State v. Scott</u> , 150 Wn.App. 281, 207 P.3d 495 (2009).....	9
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	2
<u>State v. Macon</u> , 128 Wn.2d 784, 911 P.2d 1004 (1996).....	2, 5

#### A. INTRODUCTION

Pursuant to RAP 10.10, Appellant, Edward M. Olsen ("Olsen") respectfully submits the following Statement of Additional Grounds briefing to further perfect the issues for appellate review. Olsen expands an issue raised in counsel's opening brief, and cites to additional evidence in the record that is material to the trial court's ruling below.

#### B. ASSIGNMENT OF ERROR / ISSUES PRESENTED

1. Did the trial court abuse its discretion when denying Olsen's CrR 7.8 motion by finding the recantation testimony was not credible?

#### C. FACTS OF THE CASE

Olsen hereby adopts and incorporates by reference the facts set forth in pages 3-14 of the Appellant's Opening Brief, filed by counsel on August 21, 2018, including the use of "RP" when citing the transcripts from Olsen's 2010 trial record, and "1RP" through "8RP" when citing CrR 7.8 hearing transcripts.

#### D. ARGUMENT

1. The Trial Court Abused Its Discretion in Denying Olsen's Motion on the Ground That the Recantation Testimony Was not Credible

As set forth in Appellant's Opening Brief, when considering a defendant's motion for new trial based upon new recantation evidence the trial court first makes a "threshold inquiry" into

the "reliability" of the recantation, based on the relevant circumstances of that evidence coming to light. State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996).

If the trial court finds the recantation reliable, it then determines whether the evidence meets the criteria for a new trial in that it "1) will probably change the result of the trial, 2) was discovered since trial, 3) could not have been discovered before trial with exercise of due diligence, 4) is material, and 5) is not merely cumulative or impeaching." State v. Swan, 114 Wn.2d 613, 641-42, 790 P.2d 610 (1990).

Here, the trial judge denied the motion upon her conclusion that the recantations were not credible, based on her belief that 1) the recantations were "not corroborated by the other evidence at trial," 2) the recantations were "not consistent" with the "behavior" described at trial or "the observations from other objective witnesses," 3) the recantations were not consistent with "Ms. Devenny's own testimony about the event" at the first trial, and 4) that the recantations "do not seem reasonable in light of all the other evidence." Clerk's Papers 378-91. However, taking the facts in the case as a whole, the trial court abused its discretion in making these findings.

First, the recantations were in fact corroborated by other evidence at trial. In the CrR 7.8 evidentiary hearing Devenny explained that the candle lighter that was depicted as Olsen's

at trial was actually hers. 6RP, 5-7. This is corroborated by the trial testimony that she had a "candle lighter" in her home, that she usually kept in the "junk drawer" in the kitchen. RP 612.

Devenny also admitted she had lied when she said she had not used the lighter in her room; she in fact used it for the candles. 6RP, 6-7, 22. This too is corroborated by other trial evidence. Devenny's trial testimony admitted that she burned candles in the house "a couple times a week," including the candles in the "bedroom." RP 611-612. Additionally, the police photo shows candles in the bedroom with burnt wicks that had been used. RP 453-456. More importantly, the State's expert witness eventually admitted that the candle lighter found on Devenny's nightstand was examined for fingerprints and the prints located were not Olsen's. RP 481-486, 499-500. Significantly, the contact surface of the lighter was not contaminated with gasoline. RP 488-491. Therefore, the surface was not compromised prior to the conclusion that Olsen's prints were not present. The police testified that any prints from Olsen likely would be found if he had held the lighter. RP 371-373. There was no trial testimony from Devenny or her son as to Olsen wearing gloves during this incident in Devenny's home.

Finally, the lighter was located resting under a plastic Cheetos bag. RP 407-409. This placement is far more consistent with the lighter being there in situ - which corroborates the recantation, rather than any theory that Olsen carefully placed

the lighter in that position under the bag. In fact, trial counsel's closing arguments emphasized this very important issue. RP 924-931.

Here, with Devenny having now admitted that Olsen did not have the red candle lighter in his hand, this goes directly to undermine the element of intent to commit second degree attempted murder.

Additionally, Devenny's recantation testimony that Olsen had not poured gasoline on her (6RP, 17-21) is corroborated by other independent evidence, and is consistent with the observations from another objective witness. At one point Devenny testified at trial that the gas was poured on her face and hair, and then her legs and whole body, and that she kicked the gas can when trying to get the covers off. RP 626. Yet in later trial testimony Devenny stated the gas did not burn her face. RP 657.

Eyewitness Terrence Black testified that when he encountered Devenny immediately after she had left the house and arrived at the nursing home, he saw no injuries on Devenny's face, there was no burning of the eyes, and he did not even notice that she was wet. RP 237. In actuality, Devenny only complained to him of having some gasoline on her legs. Id. This independent observation by this objective witness (who was a co-worker and friend of Devenny's) corroborated Devenny's recantation that gas only got onto her legs when she kicked the gas can. 6RP, 17-23. Devenny's kicking the gas can was testified to at trial. RP 626.

Second, the judge below also erred because the recantations do seem reasonable in light of all the other evidence. As the judge stated, in considering the recantation evidence she had a good recollection of the case. 6RP, 24-25; 3RP, 5. Of course, when hearing such a motion and assessing whether a witness's recantation is reliable, a trial court may consider the totality of the circumstances surrounding the case. Macon, 128 Wn.2d at 802. But as Olsen now shows, the judge below apparently did not fairly consider several facts that both the court and the parties were privy to.

The judge knew of Devenny's history of abusing her children, threatening them with violence, employing physical beatings, and getting them to lie for her. RP 6-13. This is certainly supportive of the recantation testimony from both Devenny and her son. The judge was also aware of Devenny's brain disorder, cognitive brain dysfunction, and history of lying. RP 18-19.

In a pre-trial hearing the judge viewed evidence on Devenny in camera on the basis to reveal possible biases, prejudices, or ulterior motives of the witness as they relate directly to the issues or personalities in the case, and evidence which test the witness's perception or memory. RP 25-29. Upon reviewing the evidence on Devenny, the judge ruled that:

"I believe an adequate threshold showing has been made [that] has to do with the allegations that the CPS notes indicate, or reveal that Ms. Devenny has an emerging personality disorder and a head injury, that she may have cognitive impairment



as a result....I am concerned about truthfulness if there's a history of lying behaviors or trying to get the child to lie"

RP 29. At the next hearing the State conceded that Devenny had "a personality disorder." RP 10-22-10, p. 31.

Further, the judge below had previously acknowledged that Devenny would have reason to want to lie at trial if a prior fight between her and Olsen was due to her beating their children, etc., which was relevant to Devenny's "credibility." RP 570. In considering these facts the judge opined, "clearly what was happening during that [prior] assault or the two sides of the story are going to be relevant information for the jury." RP 571.

Without question, at trial the judge gave considerable weight to the prior facts of Devenny lying to cover up her beating her children, because the basis for Olsen having struck Devenny in that prior incident was due to her beating the children, and Devenny fabricated charges against Olsen to shift blame from her. RP 682-683. To this point, the judge knew that Devenny had recanted her prior allegations against Olsen in writing. RP 678-681.

In the course of the CrR 7.8 proceedings, the judge stated that "I remember very, very clearly this case." 3RP, 5. Thus, with the judge having prior knowledge of Devenny's mental illness, history of lying to conceal her beating of her and Olsen's children, coercing her children to lie for her, as well as having recanted before, Olsen is entitled to a finding that Devenny's and her son's recent recantations are credible or reliable.

These two recantations are further reliable as a matter of law. As the Washington Supreme Court has reasoned, "[s]tatements made against penal interest are intrinsically reliable because a person is unlikely to make self-incriminating admissions unless it is true." State v. Chenowith, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). Here, not one, but two key witnesses against Olsen recanted. Thus, each recantation not only admitted to giving prior false testimony under oath - making it "intrinsically reliable," but each recantation cross-corroborated the other. This is a heightened showing of reliability.

Under the legal standard for considering new recantation evidence the courts have found reliability or credibility upon the fact that the recanting testimony remained consistent:

"If [the victim] were to adhere to the facts in her recantation while under oath in open court and subject to cross examination [caselaw] would require the court to permit [the defendant] to withdraw his guilty plea and proceed to trial."

In re Pers. Restraint of Clements, 125 Wn.App. 634, 642, 106 P.3d 244 (2005)(quoting State v. D.T.M., 78 Wn.App. 216, 221, 896 P.2d 108 (1995)(citations omitted)).

Here, both Devenny's and her son's CrR 7.8 hearing testimony adhered to the facts attested to in their respective declarations, and remained consistent throughout direct and cross examination. The State's primary argument was that the timing of the recantations made it look more like "buyers remorse," arrived

at due to the passage of time. But Devenny's son testified that he wanted to come forward earlier but was not sure how to go about it.

In strikingly similar circumstances, where two out of three state's witnesses recanted once becoming older, the Court of Appeals has squarely rejected the factor of timing to be determinative of whether a recantation is reliable. See In re Pers. Restraint of Spencer, 152 Wn.App. 698, 218 P.3d 924 (2009) (withdrawal of Alford plea granted upon two victims' recantations, which remained consistent throughout direct and cross examination; timing of recantation was based upon child growing older, he wanted to set the record straight but did not know how to do so. Court rejected State's argument that recantation is unreliable based solely on its timing.).

Here, Judge Dalton acted more in the role of a "thirteenth juror" and ultimately determined Olsen to be guilty, instead of merely finding the necessary indicia of reliability/credibility and then passing on the issues to the trier of fact (i.e., Olsen's exercised right to jury trial). This was ultimately improper because Judge Dalton had recognized that she was "not supposed to compare witness credibility previously found by a jury." 3RP, 5.

With credibility of the recantations being established from their redundancy, cross-corroboration, intrinsic reliability of

penal interest statements, consistency throughout direct and cross examination, as well as being sufficiently corroborated by the various facts from earlier in the trial phase, Olsen made the necessary showing to warrant relief. Because the recantation evidence goes directly to undermine the elements of felony harassment and second degree attempted murder, Olsen demonstrated that the recantation evidence was likely to change the result at trial on those charges.

As explained above, the record makes clear that the judge's enumerated bases for finding the recantations unreliable or not credible are contradicted by undisputed evidence. Instead, the judge found the recantations unreliable due to other evidence that essentially she felt went to support the verdict. But such methodology is contrary to law. Instead,

"[t]he superior court must determine whether a witness's recantation is credible before considering the defendant's motion for a new trial based on the recantations, regardless of whether there is independent evidence supporting the defendant's conviction."

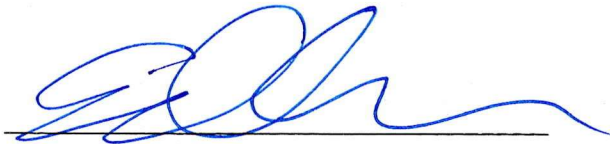
State v. Scott, 150 Wn.App. 281, 294, 207 P.3d 495 (2009)(emphasis added). With Devenny's and her son's new testimony admitting that prior statements and representations were false, it was therefore improper for the judge to explicitly rely upon other witness's testimony from trial - that itself were based, at least in part, upon false representations made by Devenny - as a basis to conclude the recantations were not credible.

Accordingly, Mr. Olsen must be afforded a new evidentiary hearing, before a different judge, at which time he can make a comprehensive showing of the evidence that supports the reliability/credibility of the two witness's recantations.

E. CONCLUSION

For the reasons stated above Mr. Olsen asks that this Court grant his appeal, and remand the case for a new evidentiary hearing before a different judge.

RESPECTFULLY submitted this 16<sup>th</sup> day of December, 2018.



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DECLARATION OF SERVICE BY MAIL  
GR 3.1

I, Edward Mark Olsen, declare and say:

That on the 16<sup>th</sup> day of December, 2018, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 51173-8-II:

Appellant's RAP 10.10 Statement of Additional Grounds;  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

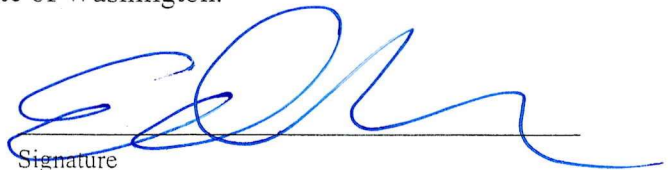
addressed to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 16<sup>th</sup> day of December, 2018, in the City of Aberdeen, County of Grays Harbor, State of Washington.

  
Signature

Edward M. Olsen

Print Name

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